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No. 86-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S THIRD SUPPLEMENTAL BRIEF

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Pursuant to Rule 22.6 of the Rules of the United States Supreme Court, Respondents, the City of New Orleans, et al., submit this brief in response to Petitioner's Third Supplemental Brief, filed with this Court on March 14, 1987.

The recent decision cited by Petitioner, *Appalachian Power Co. v. Public Service Commission of West Virginia*, No. 86-2540 (4th Cir. Mar. 4, 1987), has only marginal relation to the case at bar and does not support review by this Court. It held that federal preemption barred a state "prudence" inquiry with respect to an interstate transmission agreement, where the very issues previously decided by the Federal Energy Regulatory Commission (FERC) were the same as those proposed to be considered by the state

agency. The court expressly relied upon the "identity of the inquiries" (Slip Op. at 13), the exclusive authority of the FERC with regard to interstate transmission arrangements (Slip Op. at 8) and the fact that the utility had no practical alternative to participation in the interstate transmission arrangement (Slip Op. at 12). The court thus found a direct, facial and indisputable conflict between federal and state action which made abstention inappropriate and required preemptive relief.

The contrast between the foregoing circumstances and those of the instant case is substantial. Thus, (1) The FERC's authority here, unlike its authority respecting interstate transmission rates, is confined to interstate wholesale power sale rates, with statutory reservation of retail ratemaking authority to the states, 16 U.S.C. § 824(a). (2) The retail ratemaking issues involved here, including such matters as rate "phase-ins" (also called "levelization") and rate design, were not decided by the FERC, but were left open for local administration. (3) There was no attempt here by the local authority to review the validity or "reasonableness" of an arrangement already approved by the FERC. (4) The instant case does not involve a "prudence inquiry". Rather a separate case involving the parties now pending before the 5th Circuit does so. *New Orleans Public Service, Inc. v. The Council of the City of New Orleans*, No. 87-3049 (5th Cir. filed Dec. 19, 1986). Even the prudence case does not involve consideration of matters previously addressed by the FERC—since both the FERC administrative law judge and, in subsequent testimony, the FERC Chairman, disclaimed determination of the

prudence issue.[1] Moreover, it does not involve circumstances where the utility had no practical alternative to the purchased power arrangement that was the subject of FERC adjudication.

Accordingly, the *Appalachian Power Company* case, relied upon by Petitioners, presents no conflict with the decision of the Fifth Circuit below and does not support review here. Rather, the differences between it and the case at bar, along with other decisions cited in Respondents' principal brief, suggest that review by this Court is unnecessary, inasmuch as the Courts of Appeals have given clear indication of their disposition toward correct application of established legal principles to particular cases.

CONCLUSION

For the foregoing reasons the petition should be denied.

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[1] See Respondents' principal brief in this matter (Brief for the City of New Orleans, Et Al., In Opposition to the Petition), p. 5, n.6.

Respectfully submitted,

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